10/14/94

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff, v. NL INDUSTRIES, INC., et al., Defendants, and CITY OF GRANITE CITY, ILLINOIS, LAFAYETTE H. HOCHULI, and DANIEL M. McDOWELL, Intervenor-Defendants.	)	C.A. No. 91-CV578-JLF

MOTION FOR CLARIFICATION AND MEMORANDUM IN SUPPORT

Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("U.S. EPA"), hereby moves for clarification of this Court's announcement on September 21, 1994 concerning the "cost and fees" incurred by the parties in connection with the City of Granite City's Motion for a Temporary Restraining Order and for a Preliminary Injunction ("City's Motion"). After the parties presented the settlement of the City's Motion to this Court on September 21, 1994, this Court initially suspended any ruling on costs and attorneys' fees until later phases of the litigation, then expressed that each party would bear their own costs and fees, and then seemed to again leave the issue open for the future.

By this motion, the United States merely seeks to clarify that disposition of the City's Motion, including the September 21, 1994 announcements regarding "costs and fees," does not

address issues of whether such costs are "response costs" for which the Defendants may be liable under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), 42 U.S.C. § 9607, or in any way affect the ability of the United States to recover CERCLA response costs in Phase III of this litigation. The instant motion does not seek present determination that the costs of responding to the City's Motion are recoverable response costs. Rather, consistent with the First Case Management Order, the United States seeks a determination that issues regarding the recoverability of response costs be addressed in the last phase of this case.

I. THE UNITED STATES' COMPLAINT SEEKS MANY TYPES OF "COSTS" FROM THE DEFENDANTS WHICH WILL BE LITIGATED IN PHASE III OF THIS CASE

On July 31, 1991, the United States initiated this action against the Defendants pursuant to Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607. In the Complaint, the United States seeks, among other things,[1] the recovery of the United States' response costs already incurred, and a declaration of entitlement to future response costs, as a result of releases and threatened releases of hazardous substances at the NL Site. Complaint, ¶¶ 29-39.

[1] The United States' complaint also asserts claims for civil penalties and treble damages for Defendants' failure to comply with an administrative order issued by U.S. EPA pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606, requiring Defendants to undertake response actions at the Site.

The costs sought by the United States specifically include, but are not limited to, costs incurred and to be incurred for legal activities and enforcement activities at the Site. Complaint at ¶ 36. CERCLA clearly provides for recovery of enforcement costs. Section 107(a) of CERCLA, 42 U.S.C. 9607(a), provides for the recovery of all "removal" and "remedial" costs. CERCLA defines "respond" or "response" as "remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement related activities thereto." 42 U.S.C. § 9601(25). Furthermore, Section 104(b) of CERCLA, 42 U.S.C. § 9604(b), explicitly authorizes the President to "undertake . . . such planning, legal, fiscal . . . and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter."[2]

Numerous courts have recognized that CERCLA provides for recovery of enforcement costs. See, e.g., United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1503 (6th Cir. 1989), cert. denied, 110 S. Ct. 1527 (1990); United States v. American Cyanamid Co., 786 F. Supp. 152, 157 (D.R.I. 1992); United States v. Bell Petroleum, 734 F. Supp. 771 at 782 (W.D. TX 1990), rev'd in part on other grounds, vacated in part on other grounds, and remanded, 3 F.3d 889 (5th Cir. 1993) (allowing recovery of indirect costs

[2] The definition of "removal" expressly incorporates actions under Section 104(b).

and litigation expenses); United States v. Hardage 733 F. Supp. 1424, at 1433-37 (W.D. Okla. 1989), modified, 982 F.2d 1436 (10th Cir. 1992) (allowing recovery of litigation, enforcement and administrative costs).

On February 21, 1992, this Court entered the First Case Management Order dividing this litigation into three phases. The current phase, Phase I, is limited to remedy issues only. Phase II will cover all liability issues, and Phase III will resolve claims for response costs, civil penalties and treble damages. Accordingly, all issues concerning costs were reserved for Phase III of this case.

On August 16, 1994, the City of Granite City filed a counterclaim and a Motion for a Temporary Restraining Order and Preliminary Injunction. The City sought an order enjoining U.S. EPA from proceeding with the residential soil remedial action plan for the NL Site. The Defendants fully supported the City's Motion.

II. RESOLUTION OF THE CITY'S MOTION DID NOT RESOLVE THE UNITED STATES' COSTS

On September 21, 1994, the parties presented to this Court a stipulated settlement concerning the City's Motion. The very first provision of that agreement provides "[t]he City withdraws without prejudice its counterclaim and Motion for Temporary Restraining Order and/or Preliminary Injunction, and all related motions and memoranda." Transcript, p. 8, lines 11-14. Similarly, the next sentence provides "[t]he defendant PRPs shall withdraw without prejudice their counterclaim and all motions and

memoranda relating to its [sic] counterclaim and the City's counterclaim and the Motion for Temporary Restraining Order and for Preliminary Injunction." Transcript, p. 8, lines 14-20. The agreement did not provide for waiver of any of the United States' claims for recovery of response costs.

After the agreement was read into the record, counsel for the City of Granite City, without ever discussing the issue with the United States, remarked "[o]ne other matter that occurred to me, we are withdrawing our Motion for Preliminary Injunction. In our motion, we sought attorneys' fees and costs. I'm assuming each party will bear their [sic] respective attorney fees and costs." Transcript, p. 19, lines 13-17. There was much discussion concerning whether the costs incurred by the United States in responding to the City's and Defendant PRPs' preliminary injunction challenge are recoverable response costs (Transcript, pp. 19-25), even though the issue was never addressed in any briefs related to the City's Motion.[3] The Court first held that "nature will take its course during this litigation as to costs, eventually." Transcript p. 20 at lines 14-15. After further discussion, the Court agreed with counsel for Defendant AT&T that each party bear its costs for the

[3] It was quite a surprise that counsel for the City, not the Defendants, raised an issue concerning costs before this Court without ever discussing the issue with the United States. This is because, pursuant to the agreement which was read to the Court at the hearing, cost issues were already resolved. By withdrawing their counterclaims, the Defendants and the City also withdrew their claims for costs and fees. Without a presently outstanding claim for those costs and fees, there was no need for this Court to make any findings. Rather, the claim was withdrawn and the matter concluded.

injunction proceedings. Transcript at p. 23, line 23. After noting the United States' objection, this Court went on to hold that if "the thing comes up again, I guess we'll just have to take it up at that time . . . " Transcript at p. 23, line 24 to p. 24, line 1.

The Transcript of the September 21, 1994 hearing left much ambiguity concerning the current status of the United States' costs. This ambiguity is due in part to the fact that no party has presented legal argument or evidence on any of these costs issues. Rather, cost issues remain to be addressed, if ever, during Phase III of this case.

This motion does not require a determination by this Court at this time whether any of the United States' costs are recoverable under Section 107 of CERCLA. The United States merely requests, consistent with the First Case Management Order, that the issue be reserved for the last Phase of this case.

CONCLUSION

The United States respectfully request that this Court clarify that liability for the costs incurred by the United States in defending the City's and Defendants' injunction proceeding be postponed until Phase III of this litigation.

Submitted this 14th day of October, 1994.

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	Docket No. 91-CV-578
	)	
Plaintiff,	)	Benton, Illinois
	)	September 21, 1994
vs.	)	
	)	
NL INDUSTRIES, et al.,	)	
	)	
Defendants.	)	

SETTLEMENT CONFERENCE
BEFORE THE HONORABLE JAMES L. FOREMAN
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

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For Gould, Inc.:	Mr. Jim Curtis Seyfarth, Shaw, et al. 55 East Monroe Street Suite 4200 Chicago, Illinois 60603 312-346-8000
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(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT ON SEPTEMBER 21, 1994, WITH ALL ATTORNEYS PRESENT.)

THE COURT: For the record, this is the United States of America versus NL Industries, et al., and the intervening-defendant party is the City of Granite City. And I would like everybody that's here on behalf of the government to identify yourself for the record who's present. Mr. Grady.

MR. GRADY: My name is John Grady. I'm with the United States Department of Justice representing EPA in this action.

THE COURT: And who else is with you?

MR. GELMAN: Leonard Gelman with the Department of Justice, as well.

MR. SIEGEL: Steve Siegel with the Environmental Protection Agency.

MS. CICERO: Anita Cicero with the Department of Justice.

MR. NITCZYSKI: Mark Nitczyski with the Department of Justice.

THE COURT: Okay. There were six of you yesterday. Who's missing? Wasn't there? Is this all that was here yesterday?

MR. GRADY: All the lawyers, yes, sir. The

Assistant U.S. Attorney. Mr. Coonan, who is Assistant U.S. Attorney for the district.

THE COURT: Liam Coonan was here yesterday.

Now, on behalf of the RPRs, who's present?

MR. BONACORSI: Lou Bonacorsi for AT&T.

MR. REIS: Dennis Reis, Johnson Controls.

MR. NASSIF: Joe Nassif for AT&T.

MR. BUTTERWORTH: David Butterworth for Exide Corporation and General Battery Corporation.

MR. CURTIS: Jim Curtis on behalf of Gould.

MR. MALLIN: Ken Mallin on behalf of AT&T.

MR. CANZIUS: Preston Canzius, C-A-N-Z-I-U-S, on behalf of AT&T.

THE COURT: And on behalf of the City of Granite City?

MR. FITZHENRY: Edward Fitzhenry on behalf of the City of Granite City.

THE COURT: It is my understanding from a telephone call that I received late last evening, 7:30 to 8 o'clock, something like that, from Mr. Reis, that the matter had been resolved amicably, at least with regard to the City's Motion for Preliminary Injunction. And I would like to have it in the record or if you have it documented otherwise -- it doesn't make any difference to the Court -- what that settlement is.

And I think it would be in the best interests for all of us to have one spokesman on each side to speak for the record if that's what you want to do or if it's in writing, why, then, I guess that would then speak for itself.

MR. GRADY: Your Honor, each party has drafted a proposed stipulation. I've just been reviewing them, and they're not completely apart. There are obviously differences. If the Court would be inclined, we can confer and see if we can come to a joint written statement or if you prefer, we could each read our agreement in the record. I think it would be better to come to an agreement with a joint stipulation.

THE COURT: I agree with that, and I'll give you some time to do that. Let's see.

MR. GRADY: Having read them both, I have hopes that it can be done rather quickly.

THE COURT: Why don't I step aside and adjourn the meeting here then for a few minutes and let you attempt to do that. And then you can either have it in writing or we can go on the record with it.

And I would like, also, for you to think about if it's not in there, anything else that needs to be taken up for the future. You've got the opening of the record. I don't know about future discovery. You know, that cropped its ugly head up here last week again, and I just didn't see

fit to authorize any. I granted your motion, in effect, to quash. And then I told you about the Court's own motion to appoint experts, an expert, probably.

So you can comment. You can be thinking about that. I was just trying to think of anything else you can meditate on.

MR. GRADY: I don't believe we've discussed the conduct of discovery. I think we can at least get some preliminary ground rules hammered out today.

THE COURT: We didn't raise it when we put the hearing off before, and then all of a sudden I'm deluged with requests for discovery, and I don't know that any is needed. I would like to plug all the holes we can while everybody's here so we can avoid any potential problems.

MR. GRADY: United States also would like to respond to the government's -- to the Court's motion on the Rule 706.

THE COURT: I'll give you time to do that. I just wanted to alert you that I was going to bring it up, and I consider this the notice that's required for me to give you.

MR. GRADY: Having said that, I would like to respond at least today on the record and then comment consistent with the Seventh Circuit.

THE COURT: I will give you, both sides, time to do that. I have no trouble with that. Can you think of

anything else we need to talk about?

MR. BONACORSI: No, pretty much covers the waterfront.

THE COURT: Vicki, will you come and get me or keep in touch with them?

(THE COURT RECESSED
AT 9:45 A.M.)

(THE PROCEEDINGS RESUME
IN OPEN COURT WITH ALL
ATTORNEYS PRESENT.)

THE COURT: I guess this is, Jane, for the record, a continuation of our informal discussion earlier this morning on the record, and now I've been told that the attorneys have reached a formal agreement, although it's not maybe in written form, which is quite all right. If you want to go on the record with it instead of having it in written form, that's fine with the Court. So who wants to be the spokesman to recite what the agreement is?

MR. NITCZYSKI: Your Honor, I think I've been designated.

THE COURT: Okay.

MR. NITCZYSKI: Mark Nitczyski from the Department of Justice. Do you want me to come to the podium?

THE COURT: It would probably be better for her id you would.

MR. NITCZYSKI: The parties have agreed as follows:

THE COURT: Can everyone hear Mr. Nitczyski?

MR. NITCZYSKI: Plaintiff, the United States of America, on behalf the United States Environmental Protection Agency, Intervenor-Defendant City of Granite City and certain Defendant Potentially Responsible Parties, hereby enter into the following stipulation in resolution of City's Motion for Temporary Restraining Order and for a Preliminary Injunction.

The City shall withdraw without prejudice its counterclaim and its Motion for Temporary Retraining Order and/or Preliminary Injunction, and all related motions and memoranda. The defendant PRPs shall withdraw without prejudice their counterclaim and all motions and memoranda relating to its counterclaim, and the City's counterclaim and the Motion for Temporary Restraining Order and for Preliminary Injunction. The defendant RPRs shall withdraw without prejudice all outstanding subpoenas and discovery requests.

The United States shall withdraw all of its motions related to the City's counterclaim and Motion for Temporary Restraining Order and for Preliminary Injunction without prejudice.

The U.S. EPA shall be permitted to conduct any

residential soil excavations to which it has or obtained access to a maximum of 17 homes within Decision Unit 29, as identified in Woodward-Clyde Consultants', quote, "Adjacent Residential Area Remedial Depth Map," dated August 13th, 1992. This soil excavation shall include any City easements, including frontage areas between the sidewalk and curb, at these residential properties. U.S. EPA will not begin excavation activities at these properties before Monday, October 3rd, 1994.

The United States shall be permitted to conduct remediation within the Site at areas containing battery case materials and shall be permitted to complete restoration activities at the properties where excavation was commenced before the August 23rd, 1994, stipulation.

The U.S. EPA will reopen the administrative record for the Site which it anticipates will occur during October 1994. The reopening of the administrative record shall be consistent with CERCLA, the NCP and other applicable law. U.S. EPA's agreement to reopen the record does not constitute a waiver of any party's claims, rights, defense or legal entitlements. At the conclusion of the administrative record reopening process, U.S. EPA will issue a decision document. A copy of same will be provided to all counsel of record forthwith. At such time U.S. EPA may proceed consistent with applicable law, each party reserving all rights with respect

thereto.

To facilitate settlement of the litigation, the parties agree that certain experts for each party will meet on one or more occasions to discuss the remediation of the lead contamination at the Site, provided that such a meeting is not inconsistent with CERCLA's administrative remedy selection process. In identifying these experts and having these experts meet, no party waives its rights to limit an expert's participation in this matter, in any other manner.

The general purpose of the meeting is to consider various remediation strategies and alternatives at the Site, directed to the health effects of lead on the population in the Site.

The parties anticipate that, consistent with applicable law, the experts will have some flexibility and a role in determining an agenda by which to address the general purpose. In the event a consensus is reached, that consensus will be reported in a document to be included in the administrative record.

The City and RPRs intend to seek access to the properties described above -- pardon me -- described above in decision Unit 29 during or after remediation. The City and PRP representatives will not interfere with U.S. EPA responsibilities and will abide by all health plans, all safety and health plans, protocols, and regulations.

So long as the City and PRPs do not interfere with such actions and abide by such plans, protocols, and regulations, U.S. EPA will not exclude the City and RPRs from properties to which the City and RPRs have secured access.

U.S. EPA will not advise homeowners as to whether or not they should agree to provide the City and RPRs with access to the properties. The U.S. EPA expressly does not endorse any activities the City and RPRs may pursue at such properties.

Further, the parties have agreed to withdraw the previous stipulation that was entered into on August 23rd and would be our understanding that the Court would also withdraw that stipulation because the Court signed off on that stipulation.

THE COURT: That was continuing the hearing till today.

MR. NITCZYSKI: That's correct, Your Honor.

THE COURT: I don't know whether it was ever in the record, was it, Vicki?

THE CLERK: Uh hum.

MR. FITZHENRY: A concern we have, Your Honor.

THE COURT: Well, if you all have agreed on it, fine. I'll honor your agreement and show it withdrawn from the record.

MR. FITZHENRY: Thank you. Lou, did you want to

address discovery?

MR. BONACORSI: If the Court has questions, we have.

THE COURT: Well, I guess the agreement speaks for itself, but is it basically what we had agreed upon or you had agreed upon yesterday?

MR. NITCZYSKI: Yes, Your Honor.

THE COURT: To continue on with the 12 sites that are under the cleanup now and finish those and then to pick a possibility of 17 new sites in this one given area starting sometime on or after October the 3rd?

MR. NITCZYSKI: That's correct, Your Honor.

THE COURT: And then what else? Are you going to open the record now? I didn't hear any date for opening the record. You state October.

MR. NITCZYSKI: That's correct, Your Honor.

THE COURT: But the representation was made earlier that it would be by the 14th.

MR. NITCZYSKI: That's U.S. EPA's anticipation that it would be opened on that date. We put in the formal agreement it will be during that month, and we still anticipate that it would be October 14th, but we're not prepared to make an absolute, give you an absolute date on that.

THE COURT: There's no doubt but that it would be

open sometime in October.

MR. NITCZYSKI: That's what we anticipate, yes, Your Honor.

THE COURT: You all are satisfied with that, I guess? I mean the reopening of the record is really going to be crucial with the final disposition of this.

MR. NITCZYSKI: Given the agreement that we've entered into that limits our work, it's in our interest to get that record reopened as soon as possible.

THE COURT: I did bring up about the discovery situation, and you've alluded to it here now. You want to speak to it?

MR. BONACORSI: Yes, Your Honor. Mr. Grady and I, on behalf of the respective parties, have agreed that the parties will not undertake any discovery until a decision document has been issued by the government as a result of the record reopening process. And at that point in time, if necessary, the parties -- if this case doesn't settle all together as a result of that decision document, the parties will request the Court hold to a status conference, at which time any party desiring to pursue discovery will bring it to the Court's attention, and we can argue the decision at that time.

THE COURT: That's very good, the possible discovery pending the final decision. So that answers that

question. Very good. And maybe it is premature to talk about any future handling of it. It's really going to depend now on what happens as a result of the reopening of the record, isn't it --

MR. NITCZYSKI: That's correct, Your Honor.

THE COURT: -- basically. At the direction of how the case is going to go, whether it's going to be settled or whether we're going to have to -- whether you're going to appeal it or what have you.

MR. BONACORSI: That's correct, Judge.

THE COURT: All right. Very good. I appreciate it very much, and I do think it's my judgment that this is in the best interest of everybody concerned, and I certainly appreciate the cooperation the Court's received from the attorneys on both sides to get it this far along. And I'd like to see an early resolution of it.

As I said earlier this morning, I think all the parties deserve to have an early resolution than would be typical in a case of this size. Because if we don't resolve it, this case could go on for years as everybody knows. And if we don't handle it expeditiously, it can.

Now, the one thing that I want to do is -- and I'm going to do this formally, and I've written it out here -- it's on the Court's own motion. I am today ordering under Rule 706(a) that the parties on or before -- and this is with

regard to the experts, and I'll be amenable to how much time you need to respond with regard to that. How much time do you want, Mr. Grady, Mr. Bonacorsi?

MR. GRADY: If I may be heard briefly, as to the time, let me preface the remarks. The United States' position is that because of Section 113 of CERCLA, that the Court's review of the remedy that's ultimately selected as a result of this reopening of the record, would be based on a review of that administrative record subject to the arbitrary and capricious standard. I think if the Court finds pursuant to Rule 706 that it's appropriate to appoint a consulting expert, that that issue should be addressed after the closing of the reopening of the record. And that therefore, the timing of it should be addressed there.

Under -- as I understand Rule 706, the Court is now giving us notice to show cause why or why not the Court should appoint such as expert. As a timing thing, Your Honor's position prior to closing of the record would address the propriety of an expert during the administrative process, whereas the United States' position after the closing of the record would be different, presumably be different.

So I would propose as to timing, that id the Court is now going to formally show cause, that the timing be beyond the time period of the reopening and closing of the administrative record so that our comments on that issue can

address the propriety of an expert to advise the Court on review of the administrative record subject to an arbitrary and capricious standard and allow the administrative process to follow its course until such time.

THE COURT: Well, I think I understand your position, and I'm not sure at this juncture when and id I will even appoint an expert, but I again want my options left open about that. Mr. Bonacorsi, do you have anything to say about that?

MR. BONACORSI: Your Honor, we would support the Court's appointment of its own technical advisor in this matter, and id the Court's asking for a timing to brief the issue, id the government opposes it on the order to show cause, we would simply be asking that we be given some five or ten days after the government briefs its decision to respond.

THE COURT: Well, I don't want to get in a briefing schedule. I'd let you do it simultaneously. I don't think it's intended in that fashion. I will let you respond simultaneously, and I'll just make up my mind then. I'm not sure I'll do it, but I want to have my options open.

There's a lot of technical information that's going to be brought to the attention of the Court one way or another, and I would like to have somebody to help me interpret that. And I kind of read between the lines here

that there may be a fear that whoever I appoint would inject him or herself into the record reopening process, and I don't really contemplate that.

I'm not saying that it wouldn't be done, but to be honest with you at this point, I don't contemplate that. The direction that this thing is going, which I compliment both sides on, is that you're hoping to maybe get a consensus about this. And id that takes place, then I don't know that anybody the Court might designate would really be needed, although it might be needed for me to help me understand what the consensus is. I mean I don't know.

MR. BONACORSI: Your Honor, id I may. I think id the Court does decide to go ahead and appoint its own expert, I think the process in selecting that expert should begin probably as soon as possible in light of the fact that the record's going to be reopened, as the government represents, in October.

THE COURT: That's why I want you to give me a date, a reasonable time that you all can respond to it. I'm going to go forth with it. I understand your position. You can put it in writing again, Mr. Grady, with regard to your position then, but I'm putting you on notice that on or before -- and this is the date that I'd like to put in here now -- to show cause why an expert witness should not be appointed to aid the Court in this litigation. And also on

or before that same date, I am requesting the parties to submit nominations for the expert to be appointed. And in that, I want you to suggest to me the possible duties of the expert and suggest how the compensation should be either paid or apportioned by the expert.

MR. GRADY: Your Honor, I would propose 30 days for the government to respond to the Court's notice to show cause. Given that the record will be opened, as I represented yesterday, in mid-October, I think the timing of that is consistent with the Court's intention to appoint an expert and to comply with the Court's order this morning.

MR. BONACORSI: For the RPRs, I think we could do it in ten days. The attorneys aren't necessarily going to be involved in the reopening of the record, and I think the suggestions are going to be made by the attorneys as well as the arguments, so I think ten days would be open.

MR. FITZHENRY: For the City of Granite City, I would concur in Mr. Bonacorsi's remarks. I think there is some urgency in this process as you have pointed out yesterday and today. Even once you have your list of experts, you may not know what their availability is and so forth, so I think as much time as possible is needed for you in which to make that decision.

THE COURT: I will give you to on or before October 7th, 1994, to show cause.

MR. GRADY: Thank you, Your Honor.

THE COURT: And you understand what I want?

MR. BONACORSI: Yes, Your Honor.

THE COURT: I want you to make suggestions for nominations, suggestions about the duties, and a suggestion about how the compensation should be apportioned or paid if the Court decides to appoint one. I don't know that I have anything else to suggest. Do you, gentlemen?

MR. FITZHENRY: Just one matter. I want to thank you and your staff for indulging the parties today and yesterday. I don't know how many times you went down the flight of stairs, but it looked like a number.

One other matter that occurred to me, we are withdrawing our Motion for Preliminary Injunction. In our motion we sought attorneys' fees and costs. I'm assuming each party will bear their respective attorney fees and costs.

THE COURT: Well, I take it that that's kind of the --

MR. BONACORSI: That's the RPRs' understanding.

THE COURT: That's implicit in it.

MR. FITZHENRY: I want to be sure about that. We are withdrawing our motion, and there's no relief being sought in that matter.

THE COURT: That's good. One less decision for me

to make and I'm for it.

MR. GRADY: I hate to always be the one, Your Honor. I concur in the intent of that statement. I don't wish to interpret the provisions of Section 107 of CERCLA as to whether or not any costs incurred this week or last week are recoverable under Section 107. And to that extent, with that limitation, I would concur that the parties, otherwise, would bear their own costs.

THE COURT: Did you mean any cost immediately? That you asked for it right away?

MR. FITZHENRY: That's correct.

THE COURT: And you're withdrawing that?

MR. GRADY: That's correct.

THE COURT: I guess nature will take its course during this litigation as to costs, eventually.

MR. BONACORSI: I'm not so sure, Your Honor, I understood what Mr. Grady said about costs, what sort of reservation he was making. I thought when you settle a case or a part of a case, those -- the expenses leading up to that resolution are typically borne by the parties themselves, each party to bear their own costs, and I think that was the RPRs' understanding in resolving this matter on the basis we have over the last couple of days.

THE COURT: Well, were you guarding by your comment against the possibility of requesting costs at the end of the

litigation?

MR. GRADY: No, Your Honor, we would not. We agree with both counsel for the defendants and counsel for the City that the United States will not seek, explicitly seek costs and attorneys' fees as a result of this action. What I am reserving is my understanding of Section 107 of CERCLA to which some of the parties of this action are named defendants, that some or all of the costs that have been incurred throughout this litigation are recoverable under that section by the United States. And the United States does not intend, by stating that it will not explicitly seek attorneys' fees and costs, here to waive recoverability of any costs under phase 3 of this litigation, which Section 107 is part.

THE COURT: I don't know how to sort all of that out.

MR. BONACORSI: I don't either, Judge.

MR. FITZHENRY: I didn't even know about Section 107. Do you understand you can recover my attorneys' fees and costs incurred in the past week or so through 107 from the RPRs?

MR. GRADY: The complaint, as alleged, does not include the City as a defendant under Section 107. So your attorneys' fees and costs, my understanding, would not be a part of that action.

MR. BONACORSI: Well, Your Honor, we have the attorneys' fees and costs that all the parties incurred in connection specifically with the Motion for Temporary Restraining Order and the Motion for Preliminary Injunction. And I understand that that part of the case has now been resolved, as read into the record by counsel, and my presumption is and our assumption in discussing settlement was that those costs incurred by all of the parties in connection with that designed aspect of the case would be borne by the parties respectively.

THE COURT: On the motion that's just been withdrawn?

MR. BONACORSI: Yes.

MR. GRADY: Your Honor, it's a legal conclusion that I'm not prepared to make that the PRP defendants are obviously reserving their right to challenge id the United States were to include any of the costs incurred by attorneys for the United States as a claim under Section 107. Obviously, the PRP defendants are not waiving their right to challenge that.

What I'm saying is that without sorting through every dime that's expended in the last several weeks since the City filed its motion and since the defendants chose not to join it but to file a memorandum in discovery and so forth in response to it, that some of those costs may or may not be

recoverable or the United States may or may not seek to recover pursuant to Section 107, and I'm not prepared today to waive the applicability of that section. It was not part of the negotiations. It was not read in as part of the stipulation.

Having said that, I have represented before this Court that under general rules of civil procedure, we would not be seeking recovery of United States attorneys' fees or costs of this action from the City or from the RPRs, reserving the right under Section 107 to seek recovery of any and all costs recoverable under Section 107.

THE COURT: What do you say, Mr. Bonacorsi?

MR. BONACORSI: Sounds to me like an impasse, Judge. I'm saying each party should bear their own costs, and the government is saying no, perhaps finding its way into the lap of the Court to be decided.

I would ask that each party be ordered to bear their own costs in connection with this proceeding which has been defined by the City's Motion for Temporary Restraining Order and for Preliminary Injunction and those matters which have occurred since leading up to the stipulation that has been read into the record today.

THE COURT: That sounds reasonable to me and note your objection to it, I guess, Mr. Grady, and then id the thing comes up again, I guess we'll just have to take it up

at that time, but you don't have any intention at this time to try to recover any costs, and they don't have any intention of recovering costs from you, so it's really kind of a moot point, really, in a way.

MR. GRADY: I understand that, and I don't mean to beat a dead horse. It's not my intention. As I understand, the Court entered an order sometime ago in phase 3 of this litigation one of the components of that litigation would be United States' claim of recovery costs under Section 107. Under Section 107, costs of enforcement are recoverable under current case law and underlying to the statute.

I haven't had the opportunity nor has anyone else in the room had the opportunity to divine any costs expended by the United States in the last several weeks or month to see whether they are in response to the City's Motion for Preliminary Injunction, response to the defendants' support of that motion or whether they're generally related to the action that ultimately will be heard by this Court in phase 3 of the litigation. I'm not trying to be difficult, but I don't want to be in the position of having waived the United States' right to seek appropriate costs under Section 107.

MR. BONACORSI: I would again ask the Court to enter the order that I requested before, that each party be ordered to bear their own costs in connection with that discrete portion of the case that brought us here today.

THE COURT: I think I just said that I agree with that, with that interpretation of your agreement at this juncture. I think I've got to bring it to a conclusion, and at the same time, I note your objection to it.

MR. GRADY: Thank you, Your Honor.

THE COURT: And we'll go from there --

MR. BONACORSI: Thank you, Your Honor.

THE COURT: -- in the future. Thank you, ladies and gentlemen, with regard to it, and I appreciate it. And again, I think that everybody's best interest has been served here by the way you handled it. I do honestly and sincerely appreciate it.

(COURT ADJOURNED AT 11:50 A.M.)

REPORTER'S CERTIFICATE

I, Jane McCorkle, Official Court Reporter for the United States District Court for the Southern District of Illinois, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings of Settlement Conference had in this cause as same appears from my stenotype notes made personally during the progress of said proceedings.

DATE: _____

_____

JANE McCORKLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff, v. NL INDUSTRIES, INC., et al., Defendants, and CITY OF GRANITE CITY, ILLINOIS, LAFAYETTE H. HOCHULI, and DANIEL M. McDOWELL, Intervenor-Defendants.	C.A. No. 91-CV578-JLF

ORDER ON UNITED STATES' MOTION FOR CLARIFICATION

Upon the United States' Motion for Clarification of in-Court announcements regarding the disposition of costs and fees, this Court being duly advised GRANTS the government's motion and clarifies that liability for the costs and fees incurred by the United States in defending the City's and Defendants' injunction proceeding shall be postponed until Phase III of this litigation.

DATED: _____, 1994

_____
THE HONORABLE JUDGE JAMES F. FOREMAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff, v. NL INDUSTRIES, INC., et al., Defendants, and CITY OF GRANITE CITY, ILLINOIS, LAFAYETTE H. HOCHULI, and DANIEL M. McDOWELL, Intervenor-Defendants.	C.A. No. 91-CV578-JLF

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the United States' Motion for Clarification and Memorandum in Support, and Draft Order, were by U.S. Mail, postage prepaid, to all counsel of record on the attached service list, this 14th day of October, 1994.

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U.S. v. NL Industries, Inc., et al.
(90-11-3-608A)

(CIV. NO. 91-578-JLF)

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